

§ 22.02 Administrative Appeals

The zoning board of adjustment has the power to hear and decide appeals if it is alleged that there is error in any order, requirement, decision,¹¹ or determination made by an administrative official¹² in the enforcement of any zoning ordinance adopted pursuant to [RSA 674:16](#).¹³ In exercising this power, the board has all the powers of the administrative official from whom the appeal is taken,¹⁴ but no more. In other words, the board can grant or deny the relief requested of the administrative official or modify the relief granted or denied by the official,¹⁵ but it cannot grant a variance from the terms of the ordinance when it has only been asked to grant an administrative appeal. In an administrative appeal situation, the board is essentially putting itself in the place of the administrative official. For example, if the building inspector has denied a building on the basis that the use is not permitted, the landowner could appeal that denial to the board of adjustment and present the reasons he or she feels a nonconforming use exists at the property or argue that the inspector has mistakenly interpreted the ordinance or misunderstood the prior use of the property.¹⁶

The jurisdiction vested in the board of adjustment to hear administrative appeals is an appellate jurisdiction, not original jurisdiction. Anderson points out, for example, that the board is without authority to render an advisory opinion concerning the meaning of a zoning regulation or its application to a particular set of circumstances, but has jurisdiction to interpret the zoning regulations upon appeal from an interpretation of the ordinance by the zoning officer.¹⁷ While the Zoning Board of Adjustment is obligated to consider the "spirit of the ordinance" when considering a variance request,¹⁸ when interpreting an ordinance in an administrative appeal, the board must confine its review to the language of the ordinance when that language is plain and unambiguous.¹⁹ Thus, the normal route of a zoning dispute is from the zoning officer, through the ZBA, to the courts for judicial review. The rationale behind such routing is that the matter will reach the court with an administrative record or at least a prior administrative construction of the ordinance. The court is not bound by the interpretations of the

¹¹ RSA 676:5, II(b) defines "decision of the administrative officer" as including any decision involving construction, interpretation, or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation, or application of the terms of the ordinance which is implicated in such enforcement proceedings.

¹² RSA 676:5, II(a) defines "administrative officer" as any official or board in the municipality with responsibility for issuing permits or certificates under the ordinance or for enforcing the ordinance. It may include a building inspector, board of selectmen, or other official or board with such responsibility.

¹³ RSA 674:33, I(a).

¹⁴ RSA 674:33, II.

¹⁵ RSA 674:33, II.

¹⁶ See, e.g., *Carbonneau v. Rye*, 120 N.H. 96, 411 A.2d 1110 (1980) (plaintiff had appealed decision of the Rye building inspector to the board of adjustment after the building Inspector interpreted the ordinance as prohibiting development of a lot because the development might be "injurious, noxious or offensive to the neighborhood").

¹⁷ 4 P. Salkin, *Anderson's American Law of Zoning*, § 40:5 (5th ed.).

¹⁸ RSA 674:33, I(b)(2).

¹⁹ *Pike Indus., Inc. v. Woodward*, 160 N.H. 259-62, 999 A.2d 257, 260 (2010) (the ZBA had no need to look at the "spirit of the zoning" since the language of the ordinance concerning nonconforming uses was plain and unambiguous providing that if a nonconforming use had been discontinued for more than one year for any reason, such nonconforming use shall not thereafter be reestablished).

zoning board;²⁰ however, given the customary judicial respect for administrative interpretation of a local ordinance²¹ and the statutory presumption,²² the board's exercise of appellate jurisdiction in this area often has an important, if not decisive, impact upon the result.²³

The board of adjustment's authority to hear administrative appeals is limited strictly to zoning appeals. The authority of the planning board is exclusive in New Hampshire²⁴ in the areas of subdivision and site review, and appeals of any decision of the planning board are exclusively to the superior court.²⁵ An exception to this rule, however, are Planning Board subdivision or site plan review decisions based upon the terms of the zoning ordinance, or upon the construction or interpretation of the zoning ordinance, which would otherwise be appealable to the Board of Adjustment if made by an administrative officer. These decisions may be appealed directly to the board of adjustment.²⁶

Once the selectmen or other officials have commenced enforcement proceedings, that enforcement is not appealable to the ZBA,²⁷ although the landowner could, under certain circumstances, seek a determination from the ZBA of the terms of the ordinance implicated in the enforcement action.²⁸ Furthermore, there is no appeal to the ZBA from legislative decisions.²⁹

An administrative appeal to the zoning board of adjustment rather than a petition for mandamus is the proper avenue for an abutter who is dissatisfied with a building official's determination concerning a nonconforming use.³⁰ An administrative appeal may not, however, be filed in regard to a discretionary decision by municipal officials to commence, or not to commence, formal or informal enforcement

²⁰ *Trottier v. Lebanon*, 117 N.H. 148, 370 A.2d 275 (1977); *Win-Tasch Corporation v. Merrimack*, 120 N.H. 6, 411 A.2d 144 (1980).

²¹ *Win-Tasch Corporation v. Merrimack*, 120 N.H. 6, 411 A.2d 144 (1980).

²² RSA 677:6.

²³ 4 P. Salkin, *Anderson's American Law of Zoning*, § 42:38 (5th ed.).

²⁴ *Levesque v. Hudson*, 106 N.H. 470, 214 A.2d 553 (1965).

²⁵ *Sklar Realty, Inc. v. Merrimack*, 125 N.H. 321, 480 A.2d 149 (1984). However, interpretation of the zoning ordinance by the planning board could be appealed to ZBA.

²⁶ RSA 676:5, III. Note that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits to the planning board, the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but must be appealed to the Superior Court as provided by RSA 677:15; *Dube v. Town of Hudson*, 140 N.H. 135, 663 A.2d 626 (1995) (ZBA has explicit statutory authority to review planning board's construction of zoning ordinance); *Hoffman v. Town of Gilford*, 147 N.H. 85, 786 A.2d 93 (2001) (plaintiff appealed zoning issues arising out of planning board site plan approval, but failure to concurrently appeal planning issues to the superior court resulted in the waiver of that appeal).

²⁷ *Derry v. Simonsen*, 117 N.H. 1010, 380 A.2d 1101 (1977) (selectmen of the Town of Derry had written to defendant ordering him to cease operating his campground and advising him that the operation of the campground after a certain date would be deemed a violation of the zoning ordinance; shortly before the deadline, defendant's attorney wrote to the board of adjustment appealing the selectmen's order and challenging the enforceability of the ordinance; no request for a variance or special exception was contained in the letter; the board of adjustment refused to hear the defendant's appeal and the Supreme Court found that it had no jurisdiction to do so).

²⁸ RSA 676:5, II(b).

²⁹ 4 P. Salkin, *Anderson's American Law of Zoning*, § 40:5 (5th ed.); RSA 177:3.

³⁰ *Carrick v. Langtry*, 99 N.H. 251, 108 A.2d 546 (1954).

proceedings.³¹ Other than discretionary decisions concerning enforcement, almost any interpretation of the zoning ordinance by a zoning official may be the proper subject of an administrative appeal to the ZBA.³² Examples would be the improper issuance of a building permit by a building inspector³³ or a board of selectmen.³⁴ In all instances, an administrative appeal must be filed in a timely manner.³⁵

As a general rule, any landowner or abutter desiring to challenge a decision regarding a building permit must first file an administrative appeal with the Zoning Board of Adjustment.³⁶ If a party is dissatisfied with the decision of the Zoning Board, that party may appeal to the Superior Court but the initial appeal to the Zoning Board (as well as any necessary motions for rehearing before the Zoning Board) is a prerequisite to Superior Court jurisdiction.³⁷ The rationale for this approach is to give a local Zoning Board the first opportunity to pass upon any alleged errors at the local level so that the Superior Court may have the benefit of the Zoning Board's judgment in hearing the appeal.³⁸

The appeal to the Zoning Board of Adjustment is an "administrative remedy" and, generally, parties must exhaust their administrative remedies before appealing to the courts.³⁹ The requirement for the exhaustion of administrative remedies is based on the policy of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency. It is particularly applicable when substantial questions of fact exist concerning a local zoning ordinance and

³¹ RSA 676:5, II(b). Note that in *Bois v. Manchester*, 104 N.H. 5, 177 A.2d 612 (1962), the decision of the building inspector not to enforce a zoning ordinance was held to be appealable to the ZBA. However, Laws of 1989, ch. 69 added RSA 676:5, II(b), removing discretionary decisions concerning enforcement from the purview of the ZBA.

³² *Piecuch v. Manchester*, 114 N.H. 8, 314 A.2d 642 (1974) (building superintendent's decision was properly reviewed by ZBA).

³³ *Dumais v. Somersworth*, 101 N.H. III, 134 A.2d 700 (1957) (issuance of building permit for commercial building in residential zone was subject of valid administrative appeal to the ZBA).

³⁴ *Daniel v. B & J Realty*, 134 N.H. 174, 589 A.2d 998 (1991) (issuance of building permit by board of selectmen was proper subject for appeal to ZBA).

³⁵ *Dumais v. Somersworth*, 101 N.H. 111, 134 A.2d 700 (1957) (building permit was issued for garage on August 2, 1956, and construction was virtually completed by August 28, 1956, when appeal to the ZBA was filed; right of plaintiff to file the appeal was upheld despite the failure to officially file the request for appeal within ten days as required by the local ordinance due to the fact that plaintiff had, in fact, questioned the local building inspector, secretary to the board of adjustment, and did not have any reasonable way of knowing that the building was to be used for commercial purposes until after it was completed); *Daniel v. B & J Realty*, 134 N.H. 174, 589 A.2d 998 (1991) (ordinance required administrative appeal to be filed within 14 days of issuance of building permit; because application was not taken until the fifteenth day after issuance of the permit, the New Hampshire Supreme Court found the ZBA to be without jurisdiction); *47 Residents of Deering v. Town of Deering*, 151 N.H. 795, 868 A.2d 986 (2005) (court distinguished the Daniel case, pointing out that Deering ZBA rules specifically provided that the Board could grant a waiver on the time limits on granting an administrative appeal).

³⁶ *Sutton v. Town of Gilford*, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010) (because petitioner-abutter had failed to appeal the amended building permit to the ZBA, she was barred by the exhaustion doctrine from challenging in the Superior Court construction undertaken pursuant to that permit).

³⁷ *Sutton v. Town of Gilford*, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010). Note that RSA 677:2 provides that within 30 days after any order or decision of the Zoning Board of Adjustment, any person directly affected by that decision may apply for a rehearing. RSA 677:4 provides that the appeal to the Superior Court may be filed within thirty (30) days after the date that the Zoning Board voted to deny the motion for rehearing.

³⁸ *Sutton v. Town of Gilford*, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010) (*citing* *McNamara v. Hersh*, 157 N.H. 72, 73, 945 A.2d 18 (2008)).

³⁹ *Sutton v. Town of Gilford*, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010).

other interpretations that belong in the first instance to designated local officials.⁴⁰ It is only in limited situations that a party is not required to exhaust administrative remedies.⁴¹

In order to be filed in a timely manner, an administrative appeal to the board of adjustment must be filed "within a reasonable time."⁴² Exactly what a "reasonable time" for appealing is will depend on the circumstances in each particular case.⁴³ In determining what constitutes a reasonable time, the interests of the party benefiting from the administrative officer's or town's determination will be balanced against the interests of the aggrieved party who has filed the appeal with the ZBA.⁴⁴ The factors that are considered in determining the reasonableness of a time period include "the knowledge of the parties, their conduct, their interests, the possibility of prejudice to any party, and any reason for delay in appealing."⁴⁵ Note that the time for filing an administrative appeal generally begins to run when the appealing party knows or should have known about the decision.⁴⁶

While the administrative construction of an ordinance by the zoning authorities is neither conclusive nor binding on the superior court, construction of the ordinance by the ZBA or the building inspector is entitled to consideration.⁴⁷ Except in rare instances, a party aggrieved by the action of a municipal official in zoning matters will not be entitled to a petition for injunctive relief where the party has failed to exhaust statutory remedies such as the filing of an administrative appeal.⁴⁸

The zoning board of adjustment has broad authority on subjects within its jurisdiction, including the right in appeals from decisions by administrative officers involving nonconforming uses to impose reasonable conditions to prevent improper expansion of nonconforming uses.⁴⁹

Library References

8A E. McQuillin, *Municipal Corporations*, § 25.235 (3d Ed. 2003)

4 P. Salkin, *American Law of Zoning*, § 39:22 (5th ed.)

3 E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 57:9

⁴⁰ *Sutton v. Town of Gilford*, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010).

⁴¹ *Sutton v. Town of Gilford*, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010) (*citing* *Pheasant v. City of Nashua*, 143 N.H. 140, 141-42, 720 A.2d 73 (1998) (where the only substantive issue raised at the Superior Court and on appeal was the authority of the City's supplemental assessment for under-assessed property under RSA 76:14)).

⁴² RSA 676:5.

⁴³ *Tausanovitch v. Town of Lyme*, 143 N.H. 144, 147, 722 A.2d 914, 916-17 (1998) (because the petitioners had actual or constructive knowledge in June about a building permit and certain construction activity, their decision to wait until August 6th to file their appeal did not constitute a filing within a reasonable time).

⁴⁴ *Tausanovitch v. Town of Lyme*, 143 N.H. 144, 147, 722 A.2d 914, 916-17 (1998).

⁴⁵ *Tausanovitch*, 143 N.H. at 148, 722 A.2d at 917.

⁴⁶ *Tausanovitch*, 143 N.H. at 148, 722 A.2d at 916.

⁴⁷ *Spicer v. Claremont*, 104 N.H. 461, 189 A.2d 496 (1963) (Claremont's interpretation of the term *hotel* under the terms of its ordinance was upheld).

⁴⁸ *V.S.H. Realty, Inc. v. Rochester*, 118 N.H. 778, 394 A.2d 317 (1978) (plaintiff had prevailed in a declaratory judgment against a city ordinance; when the city later found plaintiff's land not in a zone which permitted the desired use, plaintiff sought to amend prior pleadings rather than appealing decision of building inspector to ZBA; trial court granted relief but Supreme Court reversed requiring plaintiff to exhaust administrative remedies before it could seek injunctive relief).

⁴⁹ *Peabody v. Town of Windham*, 142 N.H. 488, 703 A.2d 886 (1997) (in an administrative appeal, ZBA properly imposed limitations to prevent expansion of paving business).

*From Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 22, Powers of ZBA, §22.02
(LexisNexis Matthew Bender) (Fourth Edition)*

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